IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-930

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD,

Petitioners,

vs.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Only the second question in the Petition for a Writ of Certiorari relates to these respondents. Respondents object to the inaccurate and argumentative manner in which petitioners have stated the question. It may be more accurately stated by paraphrasing the Opinion of the Circuit Court of which review is sought:

> Under circumstances where respondents had reason to believe there was a clear and present danger of violence and disorder, could they take reasonable and good faith action to prevent the same? 448 F.2d at 1374.

STATEMENT OF THE CASE

Petitioners have not at any point in the appellate review of this case challenged the District Court's findings made after trial on the merits. (Appendix B to the Petition) Yet, in the Statement of the Case in their Petition, they present a new and unique statement of the "facts" which are inconsistent with both the District Court's findings (which the Circuit Court found specifically were supported by the record, 448 F.2d at 1372) and the facts as summarized by the Circuit Court in its Opinion, and this is done without a single reference to the record or the Appendix filed in the Circuit Court. The Petitioners' Statement may, therefore, be disregarded. The following Statement of the Case is intended only to very briefly summarize the unchallenged summary of the facts of the District and Circuit Courts with the record support therefor.[1]

The setting for the events giving rise to Petitioners' action in this case was the 1969 Inter-Tribal Indian Ceremonial held on the Ceremonial Grounds at Gallup, New Mexico. This is an annual event put on by the Inter-Tribal Indian Ceremonial Association[2] for the exhibition of Indian arts, crafts, and other products and for education of and about the American Indian. The objectives of the Ceremonial are accomplished through volunteer participation at all levels by Indians from across the country. (Findings of Fact 1 through 4; A. 160-66)

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[1] Record references will be made by reference to the Appendix filed in the Circuit Court, said Appendix having been transmitted to the Supreme Court. References to Findings of Fact will be to those made following the conclusion of the trial and reproduced in Appendix B to the Petition.

[2] While the Association was a defendant in this action in the District Court and was named by petitioners as an appellee in the Circuit Court, the petitioners have not included the Association as a respondent in their Petition to this Court. Before the District Court the Association had been dismissed as a defendant in the damage portion of the action, and during the trial the petitioners abandoned the injunctive portion of their action as to all respondents represented herein, and limited their action to their damage claim. (A. 300-01)

Mr. Benson is the only petitioner who at any time had any contact with the respondents represented herein. (Finding of Fact 8; A. 127-28, 143-44, 148, 203) Mr. Benson and others began distributing leaflets entitled, "When our Grandfathers Carried Guns" on the Ceremonial Grounds on Friday, August 15, 1969. (A. 64-65, 72-73, 85-86; see Appendix D to the Petition) The first contact between the parties occurred after 10:00 p.m. at the main exit to the grandstand on the Grounds. During an intermission of a grandstand performance, Mr. Benson took up a position at the main grandstand exit so that he was "obstructing the orderly flow of the pedestrian traffic" and began "stuffing" leaflets into the hands of those attempting to use the exit. (Findings of Fact 15 and 16; A. 170, 178-79) During the intermission the exits are particularly crowded and at this time the main exit was completely jammed so that no one else could get through it. (A. 179-80, 246-47) The concourse area outside the exit was also congested. (Finding of Fact 11; A. 128-30)

Respondents DiGregorio (who was grandstand supervisor) and Kauzlaric (who was President of the Association) became aware of what was characterized as a disturbance and disruption of traffic at the main entrance and became the first to have any contact with Mr. Benson. (Findings of Fact 6 and 16; A. 170-73, 181-82, 187-88) There followed a discussion among these three and respondent Johnson, a state police officer assigned to duty on the Ceremonial grounds. (Finding of Fact 18; A. 173-74, 183-85, 238-39) Concerned about further disturbance that could arise because of the manner and place that the leaflets were being passed out, Mr. Kauzlaric gave Mr. Benson his business card and offered to talk with him then, or at any other time, about his objections to the Ceremonial and the leafletting activities. (Finding of Fact 20, A. 84-85, 186-89, 206-07, 219) While Mr. Benson was not requested to leave the grounds, it was agreed that he would not again distribute the leaflets until he and Mr. Kauzlaric had had

a chance to discuss the matter. (Finding of Fact 20; A. 189-93, 207-08)

Petitioners Benson and Brown, still on the Grounds, then met with a group of ten or twelve young people. (Finding of Fact 21; A. 240) From this group Officer Johnson overheard someone state that if Mr. Benson wanted, they would "tear apart or burn the Ceremonial facility down." (Finding of Fact 21; A. 131, 240) Messrs. Benson and Brown then "rushed" from this group to Mr. Brown's car where Mr. Benson, for some unexplained reason, attempted to hide in the car. (Finding of Fact 22; A. 88-89, 219-20) Officer Johnson stopped and talked to the boys in what was described by all as a friendly and social manner, and Mr. Benson indicated that he was not planning on again distributing his "Guns" leaflet on the Grounds. (Findings of Fact 22 and 23)

The next day, Saturday, Mr. Benson printed 700 more leaflets (same content) and began passing them out along the Ceremonial parade route in Gallup. (A. 77-78, 140) He and Petitioners Tracy and Hubbard then returned to the Ceremonial Grounds and continued their leafletting. (Finding of Fact 29; A. 140-41) No discussion had been had with Mr. Kauzlaric, nor had Mr. Benson sought such a discussion.

In view of the disturbance on Friday, the agreement Mr. Kauzlaric had with Mr. Benson about not passing out more leaflets until discussing the matter with him, and the report he had received from Officer Johnson concerning the threat to destroy the facilities and the peculiar behavior of Mr. Benson on the previous evening, Mr. Kauzlaric was apprehensive about the reappearance of Mr. Benson. (Findings of Fact 28 and 30) He, therefore, discussed the situation with the Assistant District Attorney, respondent Rich, and the District Attorney for McKinley County, and sought their help and advice as to what might be done to prevent a disturbance and disruption on the Ceremonial Grounds. (Finding of Fact 30; A. 193-201, 210-11,

213-15, 266-72) A discussion ensued as to the manner in which, and the place where, the leaflets were being distributed, their content, whether they were provocative and would cause a disturbance, and whether they interfered with the rights of others to enjoy the Ceremonial and related matters. (Finding of Fact 31; A. 267-76, 282-84) In view of the surrounding events and the content of the leaflet, Mr. Rich stated that he considered the leaflets a call to arms and believed that a substantial disruptive interference with the Ceremonial activities could develop and lead to a riot situation. (Finding of Fact 31; A. 284-91, 296-97)

Relying upon the advice of the Assistant District Attorney, Mr. Kauzlaric revoked Mr. Benson's permission to be on the Grounds so long as he continued to pass out the leaflets and so informed Officer Johnson. (Finding of Fact 31; A. 211-12) Following discussions between Officer Johnson and the Assistant District Attorney, and between Mr. Benson and the Assistant District Attorney, the petitioners left the confines of the Ceremonial Grounds and, without objection, continued their leafletting in the less congested area immediately outside the Grounds. (Findings of Fact 33 through 37; A. 81-82, 211-12, 230-35)

At no material time did respondent Merry have any contact, directly or indirectly, with any of the petitioners. (Finding of Fact 9)

Thus ended the events upon which petitioners base their claims against respondents. It should be noted that at the trial of this case petitioners limited the issues as to the respondents represented herein to the damage claims after they had been invited to participate in the drafting of regulations regarding leafletting. (A. 300-01, 307-08) As respondent Johnson points out, petitioners are not entitled to recover damages in this case. (Memorandum Opposing Certiorari, p. 2)

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

Respondent Rich will address his brief in opposition to section "A" of Petitioners' Reasons for Allowance, and these respondents will confine this brief to section "B".

Petitioners have misconstrued the decision of the Circuit Court and the import of that decision. Petitioners attempt to limit the basis for the Circuit Court's decision to two isolated factual premises – and they challenge one of those. (Petition, p. 9) As to the challenged factual premise, it is fully supported by the District Court's Findings and the evidence before that Court.

The Circuit Court uses fully half of its Opinion to discuss the facts of this case based upon an independent review of the record – not just the two isolated facts cited by petitioners. 448 F.2d at 1372-73. The Court then clearly recognizes the very strict standards for measuring limitations on free speech that petitioners, in effect, urge were ignored by the Court. 448 F.2d 1373-74. The Court then turns to the application of these standards to this case:

> " . . . Under these circumstances, those in charge could take reasonable and good faith action to prevent a disastrous situation which they had reason to believe could occur. . . .
>
> "There was a clear and present danger of violence and disorder and the officials were not required to wait until the feared conditions actually happened to take preventive action. . . .
>
> " . . . The action of the public officials was not directed toward the dissemination of ideas or opinions, but solely to maintain peace and order on the Ceremonial Grounds and the

prevention of violence and a riotous situation. . . ." 448 F.2d at 1374.

No case cited by petitioners is in conflict with this holding. On the contrary, it is consistent with past decisions of both this Court and the Circuit Courts.

Petitioners cite five purportedly inconsistent cases. (Petition, p. 12)[3] The first is *New York Times Company v. United States*, 403 U.S. 713 (1971). Respondents are frank to admit that they are unable to understand on what basis petitioners claim that the "Pentagon Papers" case can be considered inconsistent with the instant case. The Court's decision on the facts of that case – too well known to require reiteration here – offer little guidance to a decision on the very different facts of this case. If any comparison can be made, it is that the Circuit Court in this case recognized the same strict standard cited in the *New York Times Co.* case for the impairment of First Amendment rights.

Cohen v. California, 403 U.S. 15 (1971), and *Bachellar v. Maryland*, 397 U.S. 564 (1970), were decisions holding only that criminal prosecutions based solely on the objectionable content of speech were not constitutionally permissible.

> "The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only 'conduct' which the state sought to punish is the fact of communication." *Cohen v. California*, 403 U.S. at 18.

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[3] Petitioners also discuss *Terminiello v. Chicago*, 337 U.S. 1 (1949). This case involved only an over-broad jury instruction which stretched a disorderly conduct statute beyond permissible constitutional limits. In the instant case both courts found that the circumstances went far beyond simply stirring the public to anger, inviting a dispute, or bringing about a condition of unrest, which standards were disapproved in *Terminiello*. 337 U.S. at 5.

> "Thus, on this record, we find that petitioners may have been found guilty of violating Section 123 simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions." *Bachellar v. Maryland*, 397 U.S. at 570.

As recited above, however, the facts of the instant case disclose much more than the dissemination of ideas through mere "speech." Moreover, the Circuit Court was emphatic in recognizing the very principle enunciated in *Cohen* and *Bachellar* by determining that the facts of this case went beyond mere "speech." 448 F.2d at 1373.

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), held that it was impermissible to enjoin distribution of literature "of any kind" in an entire city (of 18,000 people) when the trial court had found that

> " . . . distribution of leaflets was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace." 402 U.S. at 417.

The facts of that case make it not comparable to the instant case, but the holding, nonetheless, is certainly not inconsistent with the Circuit Court's in this case.

Finally, *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), lends no support to petitioners' contentions. The Court there held that the injunction

> " . . . must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice

> to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings." 393 U.S. at 180.

While there was no court proceedings involved in the instant case, it is worth noting that petitioners chose to ignore the offer of respondents to participate by discussion in all matters concerning leafletting activities and the petitioners' objections to the Ceremonial.

Moreover, the Court in *Carroll* specifically held that "we need not and do not decide whether the facts in this case provided a constitutionally permissible basis for temporarily enjoining the holding of the August 7 rally." 393 U.S. at 185.

Respondents oppose this Petition for a Writ of Certiorari, however, not only because the decision is not inconsistent with the cases cited by petitioners, but also because respondents believe that the decision is a correct application of well established precedent. In applying the law to the facts of this case, the Circuit Court relied principally upon: *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana* (I), 379 U.S. 536 (1965); *Feiner v. New York*, 340 U.S. 315 (1951); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Norton v. Discipline Committee of East Tennessee State University*, 419 F.2d 195 (6th Cir. 1969), *cert. den.* 399 U.S. 906 (1970)[4] Petitioners fail to even note four of these cases in their Petition, do not discuss a fifth *(Cantwell)* that is merely cited, and fail, except for a conclusory statement, to attempt to distinguish the sixth *(Feiner)*.

Respondents contend that the dictates of the law as set

[4] We add, with respect to the reasonableness of respondents' actions based upon the advice of counsel, the recent case of *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970), *cert. den.* 401 U.S. 981 (1971).

forth in these cases were carefully adhered to by the Circuit Court in this case and in this memorandum in opposition to the Petition will not attempt to restate the arguments made on the merits before the Circuit Court. A single passage from *American Communications Ass'n., C.I.O. v. Douds, supra,* describing the conflict that must be resolved by the courts will be cited:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. . . .
>
> "On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights." (citations omitted) 339 U.S. at 399.

Respondents believe that both the District and Circuit Courts in this case correctly resolved the conflict on the facts presented to them.

In summary, none of the respondents have contended that they have the right to absolutely preclude petitioners from

distributing leaflets on the Ceremonial Grounds. But they do contend, as petitioners have consistently agreed (e.g., A. 307-08), that they have the right to impose reasonable restrictions on activities so as to permit the use of the Grounds for the purposes for which they are lawfully dedicated. While no regulations existed at the time of the 1969 Ceremonial concerning this type of activity, the Association certainly could not be denied the right to take reasonable steps to stop the type of disruptive activity Mr. Benson seemed intent upon engaging in.

CONCLUSION

For the foregoing reasons, respondents, Chris DiGregorio, Edward S. ("Ike") Merry, and Richard Kauzlaric, respectfully request that the Petition for a Writ of Certiorari in this cause be denied.

Respectfully submitted,

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DATED: February 11, 1972